International Law Studies—Volume 33

International Law Situations

Situation III

STRAITS IN PEACE AND WAR

The relations of adjacent states C and D are strained. Both states are parties to the Pact of Paris of August 27, 1928. A dispute in regard to the title of Narrow Island, 20 miles in length, having one end 1½ miles off the coast of state C and the other end 6 miles off the coast of state D, has continued since 1900. The strait between Narrow Island and the mainland widens to 12 miles in the middle and the navigable channel is within 2 miles of state C for 3 miles. Each state in 1933 lands forces on the nearer end of the island and vessels of war of each are at the respective ends of the strait between the island and mainland. The strait is the more convenient and commonly used though not the sole waterway in the region.

(1) Passage through the strait is refused by states C and D and their vessels of war threaten to maintain the closure.

The *Circa*, a vessel of war of state C, 5 miles to seaward of Narrow Island, orders the *Bara*, a merchant vessel of state B, not to use its radio for any purpose while in the neighborhood. The *Bara* insists upon proceeding through the strait and on the use of its radio.

(*a*) What are the rights of states C and D?

(*b*) What are the rights of other states?

(*c*) What are the rights of the *Bara*, both outside and within the strait?

(2) Later state D, maintaining that the action of state C already constitutes war, issues a declaration of war against state C.

State C then gives notice that, in self-defense, it has mined its end of the strait.

(*a*) What are the rights of states C and D?

(*b*) What are the rights of other states?

(*c*) What would be the rights of the *Bara* after the declaration?

SOLUTION

1. *In time of peace.*—(*a*) States C and D have no exceptional rights of jurisdiction over a strait along their coasts connecting generally used water areas, though states C and D may take action necessary for self-defense.

(*b*) Vessels of other states have the right of innocent passage through the strait but they are subject to reasonable regulations while within the territorial waters of C or D.

(*c*) The *Bara* as a merchant vessel of state B is entirely exempt from the jurisdiction of state C while on the high sea but must conform to the regulations of states C and D when within the jurisdiction of those states.

2. *In time of war.*—(*a*) States C and D have a right to regulate the use of their territorial waters and the waters within the immediate area of their operations.

(*b*) Vessels of neutral states have the right of innocent passage through the strait though they are subject to reasonable regulations while within the territorial waters of C or D. In view of the fact that the strait is not the sole but the more convenient and commonly used waterway, the rights of C or D may as an extreme measure extend to closing of the strait.

(*c*) After the declaration of war, the *Bara* as a merchant vessel of state B, is under obligation to observe the regulations of state C or D when within the territorial jurisdiction or the immediate area of the operation of their forces.

NOTES

Strained relations.—The relations between neighboring states are rarely such as to be without strain at

some point. The existence of such states as political entities is in itself an indication that the public well-being of each is viewed as somewhat different; otherwise they might unite.

One of the most frequent bases of differences between adjacent states has been in regard to boundaries or territorial claims. Frequently boundary conventions have been drawn up without adequate knowledge of the geography of the area involved and subsequent investigations have shown that the distinctive characteristics do not exist. Even mountain ranges and rivers in some cases have not been found within the area mentioned in a convention or not at the supposed location. Claims and counterclaims have easily arisen as settlers move into such areas or valuable deposits of minerals are found in the region. Even the mere desire on the part of a state to extend its territorial jurisdiction over barren or unoccupied territory may give rise to contention. Ethnic questions have often brought states into antagonism.

Strained relations is a term which has been used to indicate an attitude of opposition of states to one another in any degree short of war. Such relations often lead to war but are not war and the existence of these relations does not bring into operation the law of war.

The Pact of Paris.—The so-called "Pact of Paris" of August 27, 1928, or the Treaty for the Renunciation of War, grew out of the draft of a proposed bilateral pact of perpetual friendship between France and the United States which had been under consideration by the two powers from June, 1927. In the note of the American Secretary of State, December 28, 1927, advocating the extension of the treaty in such manner as to include the principal powers of the world, it was said that this would be "an impressive example to all other Nations of the world" in "condemning war and renouncing it as an instrument of national policy in favor of the pacific

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settlement of international disputes." The French reply of January 5, 1928, was that France was prepared to join the United States in renouncing " all war of aggression " in favor of employment of pacific means.

When in a note of January 11, 1928, the American Secretary of State raised question as to the proposal to limit the multilateral treaty to wars of aggression, the French Government replied that most of the principal powers were members of the League of Nations and

> They are already bound to one another by a Covenant placing them under reciprocal obligations, as well as by agreements such as those signed at Locarno in October 1925, or by international conventions relative to guaranties of neutrality, all of which engagements impose upon them duties which they can not contravene.
>
> In particular, Your Excellency knows that all states members of the League of Nations represented at Geneva in the month of September last, adopted, in a joint resolution tending to the condemnation of war, certain principles based on the respect for the reciprocal rights and duties of each. In that resolution the powers were led to specify that the action to be condemned as an international crime is aggressive war and that all peaceful means must be employed for the settlement of differences, of any nature whatsoever, which might arise between the several states. (Treaty for Renunciation of War. Text of the Treaty, Notes Exchanged, Instruments of Ratification, etc. U.S. Government Publication No. 468, p. 20.)

This note went even further and, proposing sanctions, said:

> The Government of the Republic has always, under all circumstances, very clearly and without mental reservation declared its readiness to join in any declaration tending to denounce war as a crime and to set up international sanctions susceptible of preventing or repressing it. (Ibid., p. 21.)

It was clearly stated that the Pact in no way " Either violates the specific obligations imposed by the Covenant or conflicts with the fundamental idea and purpose of the League of Nations. * * * If, however, such a declaration were accompanied by definitions of the word ' aggressor ' and by exceptions and qualifications stipu-

lating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed."

There was much correspondence upon the objects which the negotiators had in view, some of which were not susceptible of consistent interpretation with propositions made from time to time by the same writers. It was, however, clearly stated in the preliminary correspondence between the United States and France that the right of defense was not impaired. The condemnation of war as an instrument of national policy is understood "in other words as a means of carrying out their own spontaneous independent policy."

In transmitting its adherence to the Pact of Paris, the Union of Soviet Socialist Republics, M. Litvinoff, called attention to the strict interpretation of certain terms in the Pact.

> In considering the text of the pact the Soviet Government deems it necessary to point to the lack of plainness and clearness in article 1 of the very formula that forbids war, which is open to divergent and arbitrary interpretations. For its part, the Soviet Government believes that any international war must be forbidden either as an instrument of what is styled "national policy" or as a means to promote other ends (for instance the repression of movements for liberating peoples, etc.). In the opinion of the Soviet Government, it is necessary to forbid not only wars in a juridical and formal construction of the word (that is to say, assuming a "declaration of war," etc.) but also military actions such as, for instance, intervention, blockade, military occupation of foreign territories, of foreign ports, etc. The history of these last few years records quite a number of military actions of that kind which have brought upon peoples awful calamities. (Ibid., p. 269.)

The notes of the Union of Soviet Socialist Republics also referred to the British statement that there were

> Certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire

a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government. (Ibid., p. 45.)

In regard to this position, the Union of Soviet Socialist Republics said,

If they are regions forming part of the British Empire or its Dominions, they are already all included in the pact, and the case of any aggression against them is provided for in the pact so that the reservation of the British Government in regard to them might seem to be at least superfluous. But if other regions are meant, the signatories of the pact have a right to know exactly where the freedom of action of the British Government begins and where it ends.

But the British Government reserves to itself full freedom of action not only in cases of armed aggression against those regions but even in cases of any act whatsoever of enmity or "of interference" which would justify the British Government in opening hostilities. Recognition of such a right for that Government would amount to justifying war and and might be taken as a contagious example to other signatories of the pact who, on the assumption that they have the same right, would also claim the same liberty with regard to other regions, and the result would be that there would probably be no place left on earth where the pact could be put in operation. Indeed, the restriction made by the British Government carries an invitation to another signatory of the pact to withdraw from its operation still other regions. The Soviet Government can not help regarding this reservation as an attempt to use the pact itself as an instrument of imperialistic policy. (Ibid., p. 271.)

Self-defense and treaties.—It scarcely needs argument to establish the fact that states do not negotiate a treaty to the end that their position in the world may be less favorable than when they were not parties to the treaty. The aim of many treaties according to their preambles is the maintenance of peace, the establishing of order and

justice, or mutual aid of some sort. While there are sometimes professions of aiming to promote the general good, it is usually in a direction closely related to the national good. This is particularly the case where treaties require for their operation the approval of some elective legislative body dependent upon majority vote. Sometimes such a body does approve a treaty that seems innocuous if it has a fair popular support. The same attitude is sometimes taken upon treaties which may do no harm, but possibly may be of advantage.

As self-defense is regarded as a fundamental right of a state, this right would be understood in no case to be abrogated without express provision. Certain prerequisites to the legitimate exercise of national forces for self-defense are often agreed upon such as conciliation, arbitration, etc.

Maritime jurisdiction in general.—In the International Law Situations of the Naval War College of 1928 (pp. 1–39), the general subject of maritime jurisdiction and the development of the law relating to maritime jurisdiction received quite full attention. This treatment showed that there had been many differences among states both in practice and theory and that there had been wide divergences in the opinions of writers. Controversies in regard to the control of the sea had been common for many centuries and claims to exclusive control of oceans had often been made. While from the days of Bynkershoek and the treaties of the early eighteenth century there was a tendency to adopt the cannon shot, at that time about 3 miles, as the limit of coast jurisdiction in adjacent waters, this was not uniformly accepted. The opinions of publicists, even in America, varied from time to time. Chancellor Kent considered that it would not be an unreasonable assumption for the United States to claim maritime jurisdiction "from quite distant headlines, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of

Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coasts, far beyond the reach of cannon shot, as cruising ground for belligerent purposes." (Commentaries on American Law, 14th ed., p. 26.)

There had been a considerable body of opinion in favor of a general acceptance of a 6-mile limit before the World War. Since that time there has been a drift toward acceptance of a 3-mile limit as a minimum but recognizing that there were many claims to wider jurisdiction. The United States Government has usually maintained the 3-mile limit in recent years, though expressed willingness to consider a wider zone.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles. (*Cunard S.S. Co.* v. *Mellon* (1923), 262 U.S. 100.)

The 3-mile limit was also embodied in the provisions of the numerous treaties which the United States negotiated from early 1924 in regard to the smuggling of intoxicating liquors.

Maritime jurisdiction; customs.—On June 13, 1929, the schooner *Dorothy M. Smart* when 11½ miles off the coast of Nova Scotia was seized by a customs officer. The case was appealed and finally came to the Judicial Committee of the Privy Council which gave judgment, July 28, 1932. In this judgment it was said,

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 and 19 Geo. V., c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

The enactments impugned are contained in sections 151 and 207 of the statute as amended.

Section 151 provides as follows:

"(1) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port. . . .

"(7) For the purposes of this section and section two hundred and seven of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Section 207 enacts as follows:

"(1) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her . . . cargo shall be seized and forfeited. . . ."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of 12 miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial Judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five Judges of the Supreme Court of Nova Scotia *in banco*. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Mr. Justice Duff, Mr. Justice Rinfret, and Mr. Justice Lamont—Mr. Justice Newcombe and Mr. Justice Cannon dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may

enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. * * *

In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. * * *

So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by section 179, authorized the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the Coast. (*Croft* v. *Dunphy*, July 28, 1932.)

Straits.—The word "strait" has sometimes been used to describe an estuary separating two land areas and open to the high sea only at one end. The strait here under consideration is between an island and coasts of states C and D and is a waterway navigable and open to the sea at both ends. The bodies of water sometimes called straits and opening to the sea at one end only have usually been subjected to a greater degree of control by the adjacent state or states than have straits connecting seas. The demarcation of the limits of jurisdiction may be in the competence of the adjacent states and the nature of the exercise of the jurisdiction may be similarly determined.

An example of this latter type is found in the treaty of February 28/16, 1825, between Great Britain and Russia in articles II and III.

II. In order to prevent the Right of navigating and fishing exercised upon the Ocean by the Subjects of The High Contracting Parties, from becoming the pretex for an illicit Commerce,

it is agreed that the Subjects of His Britannick Majesty shall not land at any place where there may be a Russian Establishment, without the permission of the Governor or Commandant; and, on the other hand, that Russian Subjects shall not land, without permission, at any British Establishment on the North-West Coast.

III. The line of demarcation between the Possessions of the High Contracting Parties, upon the Coast of the Continent, and the Islands of America to the North-West, shall be drawn in the manner following:—

Commencing from the Southernmost Point of the Island called *Prince of Wales Island*, which Point lies in the parallel of 54 degrees 40 minutes North latitude, and between the 131st and 133d degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the Channel called *Portland Channel*, as far as the Point of the Continent where it strikes the 56th degree of North latitude; from this last-mentioned Point, the line of demarcation shall follow the summit of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West longitude (of the same Meridian); and, finally, from the said Meridian Line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the Continent of America to the North-West. (12 British and Foreign State Papers, p. 38.)

This treaty subsequently became of importance to the United States as successor to Russia in this region.

Another boundary involving a strip of water running inland between two states was on the northwest frontier of the United States and in the treaty of June 15, 1846, it was stated,

Article 1. From the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean;—*Provided, however*, That the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude,

shall remain free and open to both parties. (9 U.S. Stat. p. 869.)

The Fuca's Straits here mentioned at the entrance near Bonilla Point are somewhat more than 10 miles wide and at points within much wider, but a boundary covering these waters was accepted by the United States and Great Britain in 1873 in accord with an arbitral award of the German Emperor.

Jurisdiction over straits.—During the latter half of the nineteenth century there was a considerable drift toward widening the generally accepted area of jurisdiction of the sea. This tendency would also extend to jurisdiction over straits. After much discussion the Institute of International Law at its sessions in 1891, 1892, and 1894, gave attention to the question of definition and status of the territorial sea and in 1894 adopted the following:

ARTICLE 10. The provisions of the preceding articles apply to straits whose breadth does not exceed twelve miles, subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

ARTICLE 11. The *régime* of straits actually governed by special conventions or usages remains reserved. (Resolutions of the Institute of International Law, Carnegie Endowment for International Peace, p. 115.)

As the 6-mile limit for jurisdiction over the territorial sea was not generally accepted, the tendency has been to accept the principles of article 10 with the substitution of 6 in place of 12 miles.

Black Sea Straits.—Since late in the eighteenth century the passage from the Mediterranean to the Black

Sea has become an international question of capital importance. During the years when the whole coast line of the Black Sea and its entrances was under the jurisdiction of Turkey, there was little discussion of international rights. When Russia by treaty in 1774 obtained rights of passage through the Dardanelles and Bosphorus for Russian vessels of commerce, new problems arose and the "Straits question" as it came to be called became a European problem. During the Napoleonic Wars the passage of vessels of war gave rise to controversy and during the nineteenth century the degree of control of the Straits varied with the national relations. The United States did not formally admit the right to close these waters. Questions arose in regard to the passage of the Russian volunteer fleet vessels, particularly the *Smolensk* and *Peterburg*, during the Russo-Japanese War, 1904–05. (1906 Naval War College, International Law Topics, p. 119; 1907 Naval War College, International Law Situations, pp. 48–50; 1912 Ibid., p. 171.) Other problems arose when the *Breslau* and *Goeben*, German cruisers, sought refuge from the allied forces by entering the Straits.

In the Treaty of Sèvres, August 10, 1921, between the Principal Allied Powers and Turkey, provisions were made in section II of part III for navigation and control of the straits. Article 37 stated that,

> The navigation of the Straits, including the Dardanelles, the Sea of Marmora and the Bosphorus, shall in future be open, both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft, without distinction of flag.
>
> These waters shall not be subject to blockade, nor shall any belligerent right be exercised nor any act of hostility be committed within them, unless in pursuance of a decision of the Council of the League of Nations.

Article 38 and following articles delegated control to a "commission of the straits" and outlined the method of control. This Treaty of Sèvres gave to Greece a

measure of control of the European shore of the Dardanelles and in this and other respects was unacceptable to Turkey and after further negotiations, Turkey taking advantage of the troubles of the Allied Powers, was able to make more favorable terms at the Lausanne Conference in 1923. In the Convention relating to the Régime of the Straits signed at Lausanne, July 24, 1923, Turkey obtained modification of many of the detailed restrictions of the unratified Treaty of Sèvres as well as control of the European coast of the Dardanelles, though "The principle of freedom of transit and of navigation by sea and by air, in time of peace as in time of war, in the Strait of the Dardanelles, the Sea of Marmora and the Bosphorus" is recognized in article 23 of the treaty which the convention elaborates.

Straits of Magellan.—Spain from 1520 held authority over the southern portion of South America and jurisdiction over the Straits of Magellan. Spain attempted to fortify the strait and for a time to close it to navigation. The establishing of the independence of the Argentine Republic and of Chile introduced new problems relating to the jurisdiction and navigation of these straits.

Since the last quarter of the nineteenth century the right of states adjacent to the Straits of Magellan to close that strait has ordinarily been denied. The Straits of Magellan afford a much more convenient and safer route for vessels passing from the southern Atlantic to the southern Pacific Ocean than the route by open sea. These straits for about 300 miles furnish an inland waterway from 2 to more than 10 miles in width. Part of this waterway is wholly within the jurisdictional area claimed by Chile and part is between Chile and the Argentine Republic. There has been much controversy between the two states over their respective territorial limits.

By the treaty between the Argentine Republic and Chile signed July 23, 1881, it was provided—

ARTICLE 5. The Strait of Magellan is neutralized, and free navigation thereon insured to the flags of all nations. With a view

to guaranteeing this freedom and neutrality, no fortification or military defenses will be raised that may clash with that object. (72 British and Foreign State Papers, p. 1103.)

Decrees of Chile, 1914.—The status of Chilean territorial waters and the Straits of Magellan so far as Chile was concerned was defined in two decrees in 1914.

No. 1857.

MINISTRY OF FOREIGN RELATIONS,
SANTIAGO, *November 5, 1914.*

Considering that, although it is true that the laws of the Republic have determined the limits of the territorial sea and of the national domain, and the distance to which extend the rights of police in all matters concerning the security of the country and the observance of customs laws, they have not fixed the maritime zone in reference to the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts; and that it is proper for sovereign states to fix this zone.

It is decreed:

The contiguous sea, up to a distance of 3 marine miles counted from the low-water line is considered as the jurisdictional or neutral sea on the coasts of the Republic for the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts.

Let it be noted, communicated, published, and inserted in the Bulletin of the Laws and Decrees of the Government.

BARROS LUCO.
MANUEL SALINAS.

(1916 Naval War College, International Law Topics, p. 19.)

No. 1986.

Considering that the Strait of Magellan as well as the canals of the southern region lie within the international limits of Chile, and consequently form part of the territory of the Republic,

It is decreed:

In reference to the neutrality established in the decree No. 1857 of November 5 last of the ministry of foreign affairs, the interior waters of the Strait of Magellan and the canals of the southern region, even in the parts which are distant more than 3 miles from either bank, should be considered as forming part of the jurisdictional or neutral sea.

Let it be noted, communicated, published, and inserted in the Bulletin of the Laws and Decrees of the Government.

BARROS LUCO.
MANUEL SALINAS.

(Ibid, p. 21.)

League of Nations Committee and straits.—On September 22, 1924, the Assembly of the League of Nations requested the Council to convene a committee of experts to consult and report to the Council upon what questions were sufficiently ripe for consideration with view to a progressive codification of international law. Among subjects regarded as fitted for an international conference was territorial waters. This committee of experts adopted a plan for a questionnaire to be submitted to the various states with the purpose of determining what should be the course of their labors. From this questionnaire matters relating to private international law, the law of war and of neutrality were in general excluded. In the report of the subcommittee—Messrs. Schücking, de Magalhaes, and Wickersham—having to do with territorial waters, Mr. Schücking's first draft provided in article 6:

The régime of straits at present subject to special conventions is reserved.

In Straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line. (20 Amer. Journ. International Law, Supplement [1926], p. 117.)

This was not approved by the subcommittee. In commenting on this rule, Dr. Schücking remarked:

The legal view most generally favoured fixes as the limit the middle of the strait.

A rule of law not without practical importance which has been established as regards rights in straits serving as a passage to open seas is that such a strait may never be closed. This rule

is in accordance with the idea that a riparian State is not entitled in time of war completely to close its territorial sea. (Ibid., p. 89.)

Mr. Wickersham in referring to Dr. Schücking's attitude on straits said,

If the strait be more than six miles in width and the land on either side is owned by a different State, the general rule is that the boundary line runs through the middle of the stream. If, on the other hand, the stream be less than six miles in width, the principle of thalweg would ordinarily apply, although the rule is not uniform (see Hall, pp. 195–6; Lawrence, 140; Crocker, 281). If the shores of a strait on both sides are owned by one nation but the strait connects waters the opposite banks of which are owned by different Powers, the strait constitutes a maritime highway which may not be closed by the proprietor State (Rayneval, *Institutions du Droit de la Nature*, I, p. 298), e.g. the Baltic, the Dardanelles. (Ibid., p. 140.)

The draft convention as amended by Dr. Schücking in consequence of discussion by the committee of experts contained the following article in regard to straits:

Article 6. The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds ten miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding ten miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line. (Ibid., p. 142.)

Comments on proposed article 6.—In the preliminary replies there was a wide diversity of opinion among states upon the amended article 6 of the League of Nations Committee which proposed a 10-mile limit for straits.

Germany commented to the following effect:

Ad Article 6.—If the three-nautical-mile zone is taken as a basis, the legal status of straits should depend solely on whether their width at the entrance is over or under six nautical miles, as the case may be. (League of Nations. C. 196. M. 70. 1927. V. p. 131.)

International Law Association, 1926.—The International Law Association which had considered the ques-

tion and prepared a draft convention on the law of maritime jurisdiction in time of peace embodied in this convention in 1926 the following articles:

IV. Straits and Natural Channels Connecting Two Seas

ARTICLE 14

In the case of straits and natural channels which connect two or more seas and which divide two or more States, the limit of the territorial jurisdiction of each State shall be the middle line of the strait or channel which divides them, when the strait or channel is six miles or less in width.

ARTICLE 15

Where a strait or channel is more than six miles in width, the right of territorial jurisdiction of the littoral States extends to three miles from their respective coasts; beyond this limit its status is the same as on the high sea.

ARTICLE 16

When the power to make transit regulations is not vested in an international body, the regulations enacted by the littoral States shall, as far as possible, be uniform and such as not to interfere with freedom of navigation. (Report, 34th Conference, 1926, p. 101.)

Japanese Branch of the International Law Association.—The Japanese Branch of the International Law Association in 1926 accepted as the limit of the marginal sea the 3-mile line from the low-water mark and the 10-mile line for mouths of bays wholly bounded by one State. The draft prepared by the Japanese branch also had an article relating to straits as follows:

Article 3. If, in the case of straits the coasts of which belong to the same State, the distance between the shores of each entrance does not exceed ten marine miles, the littoral waters extend outwards at right angles from the straight lines respectively drawn across each entrance of the straits at the first points nearest the open sea where the width does not exceed ten marine miles.

In the case of straits the coasts of which belong to two or more different States, the littoral waters follow the trend of the coasts according to the general rule; but in case the distance between

the two shores does not amount to six marine miles, the dividing line between the respective littoral waters shall in principle be the middle line measured from the two coasts. (25 Revue de Droit International et Diplomatie [Tokio], July, 1926.)

Closure of ports.—Certain aspects of the closure of ports were considered in the Naval War College International Law Situations, 1930, under situation II. It was shown that ports were for various reasons closed for periods in time of peace and by effective blockade in time of war.

In May 1910, instructions had been issued in regard to interference with shipping off the coast of Nicaragua:

"'The Secretary of State then held that if the announced blockade or investment was effectively maintained, and the requirements of international law, including warning to approaching vessels, were observed, the United States Government would not be disposed to prevent its enforcement, but reserved all rights in respect to the validity of any proceedings against vessels as prizes of war. In the present instance it should, however, be observed that a vessel which, by deceiving the authorities at a port of the United States, sailed therefrom in the guise of a merchantman, but had in reality been destined for use as a war vessel, by such act has forfeited full belligerent rights, such as the right of search on the high seas and of blockade.' Also the letter of the Secretary of State to the Secretary of the Navy as of June 3, regarding a proposed instruction to Commander Gilmer, which instruction was also given: 'This Government denies the right of either faction to seize American-owned vessels or property without consent of and recompense to the owners. In such cases, if you can ascertain ownership, you will instantly act in accordance with this policy.' And the letter from the Secretary of the Navy to the Secretary of State of June 7, containing the notifications issued by Commander Gilmer under date of June 3: 'I received a communication to-day from Gen. Rivas, commanding Madriz forces, Bluefields Bluff, stating that certain vessels have been used by Estrada forces and that he would not permit vessels of Bluefield Steamship Co., Atlantic Navigation Co., Bellanger Co., and Cukra Co., all American companies, to pass through the waters held by Madriz forces. I informed him that Estrada had the right to use these vessels with consent of owners if properly remunerated, but while so used Rivas had

the right to capture or destroy them; but when in the company's legitimate trade I would permit no interference with them. I have ordered guard American marines or sailors on vessels passing Bluff when in legitimate trade. Have informed Rivas that if they were fired upon I would return the fire and would seize the *Venus* and *San Jacinto*, and that I would permit no interference with shipping of American firms in legitimate business.' " (1910 U.S. Foreign Relations, p. 756.)

It has been admitted that a state may act for its own defense by closing its ports in whole or in part.

Closure of straits.—There may be a difference of opinion as to closing a strait which is a highway for commerce. If a strait is the sole highway for commerce between two open seas, it has been generally maintained since the middle of the nineteenth century that it may not be closed as this would constitute a denial of the freedom of the sea. This position does not necessarily deny to a state adjacent to the strait the right to take within its own jurisdiction measures essential to a reasonable degree of protection for itself. These measures should, however, be restricted both in time and in character to action that would constitute the minimum degree of interference with innocent passage.

The Declaration of France and Great Britain, April 8, 1904, respecting Egypt and Morocco in article VII provides for the free passage of the Straits of Gibraltar as follows:

In order to secure the free passage of the Straits of Gibraltar, the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebon.

This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean. (32 Martens, Traités Générales, Noveau Recueille, 2d ser., 1905, pp. 15, 20.)

Declaration of war.—From early Biblical times there was usually a considerable degree of formality in instituting war measures. Formal announcements and re-

plies were common. The Greeks and Romans made declarations and at times prescribed a period between declaration and active hostilities during which satisfaction might be made. The sending of heralds, the issuing of ultimata, periods of grace, challenges, etc., in varying forms continued to be used till the late seventeenth century.

With extension of overseas territories and the development of maritime activity, practice became less strict and embargoes, letters of marque and reprisal indicated changed attitudes. During the eighteenth and nineteenth centuries the greater number of wars were carried on and concluded without declaration. Many complications and uncertainties arose in consequence of this change and the statement of the Court in the case of the *Buena Ventura* set forth the situation as of 1899:

> The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, though no proclamation may have been issued, no declaration made, and no action of the legislative branch of the government had. (87 Fed. 927; 175 U.S. 384.)

The uncertainty of the time at which war commenced gave rise to many difficulties as the relations of belligerents and of neutrals changed. Intricate legal problems arose as to rights of capture, transfer of titles, and other relations common in modern relations among states and among their citizens. Accusations of treachery and many forms of misconduct had arisen in recent years because of resort to war without previous declaration.

In 1906 the Institute of International Law had after full discussion adopted the following resolutions:

> 1. It is in accordance with the requirements of international law, and with the spirit of fairness which nations owe to one another in their mutual relations, as well as in the common interest of all States, that hostilities must not commence without previous and explicit warning.

2. This warning may take place either under the form of a declaration of war pure and simple, or under that of an ultimatum, duly notified to the adversary by the State about to commence war.

3. Hostilities shall not commence before the expiration of a delay sufficient to make it certain that the rule of previous and explicit notice cannot be considered as evaded. (Scott, Resolutions of the Institute of International Law, p. 164.)

At the Second Hague Peace Conference, 1907, a somewhat more satisfactory form was adopted which gave a sanction to the requirement of a declaration by exempting neutrals from liability unless the state of war should be made known. Hague Convention III relative to the Commencement of Hostilities took the following form:

ARTICLE 1. The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

This convention was generally ratified.

Reasons for declaring war.—The first article of Hague Convention III, Commencement of Hostilities, had provided for a declaration with reasons and reasons were given in the more than 50 declarations issued in the World War. These reasons included acts of aggression, cooperation with enemy, alliance with enemy, violation of treaties, subversive intrigues, violation of neutral rights, common cause with democratic nations, fulfillment of national aspirations, defense of navigation of the seas, and many others both concrete and abstract.

Brazilian rules, 1933.—Subsequent to the submission of this situation for consideration at the Naval War College, the Paraguayan Republic on May 10, 1933, declared a state of war with Bolivia. Argentina, May 13, 1933; Brazil, May 23, 1933; Chile, May 13, 1933; Peru, May 13, 1933; and Uruguay, May 12, 1933, declared neutrality. Brazil has usually issued detailed rules in regard to neutrality. Owing to the geographical situation of Bolivia and Paraguay as states with no seacoast but with river connections to the sea through neutral states, questions as

to communication and trade became important. Brazil aimed to maintain its neutrality by specific articles in its rules of neutrality such as—

ARTICLE 3. The agents of the Federal Government or of the States of Brazil are forbidden to export or to favor directly or indirectly the remittance of war material to either of the belligerents.

ARTICLE 4. The provision of the preceding article does not prevent the free transit, river or land, assured by treaties in effect between Brazil and either of the belligerents.

ARTICLE 5. It is forbidden to the belligerents to make on the land, river, or maritime territory of the United States of Brazil, a base of war operations or to practice acts which may constitute a violation of Brazilian neutrality.

Opening of hostilities.—The representatives of the states assembled at the Second Peace Conference at The Hague in 1907 in Conventions II and III distinguished between "recourse to armed force" [recours à la force armée] and "hostilities" [les hostilités]. In Convention II the powers state their desire to avoid "armed conflicts of a pecuniary origin", while the preamble of Convention III states that the Contracting Powers

Considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;

That it is equally important that the existence of a state of war should be notified without delay to neutral Powers;

have agreed upon the following articles.

Before 1907 some writers had maintained that there was some sort of "political morality" which should be observed by states obliging them to make it publicly known before engaging in war. There was, however, before 1907 no legal obligation to make a declaration before engaging in hostilities and the legality of war without declaration was admitted in practice and by the courts. Evidence of the confusion which such a position may entail may be seen in the early stages of the Russo-Japanese war, 1904, as well as the Spanish-America war,

1898. With these facts in mind, the delegates at The Hague in 1907 hoped to and did, take a step toward peace by defining the conditions essential to the legal opening of hostilities.

The experience of states of the world since 1907 would seem to be sufficient to prove the legal value of a convention which would fix the time of and prerequisites for the opening of hostilities. The demarcation of the line between the use of force in time of peace and the hostile use of force in time of war should not be left uncertain. Frequently the use of force in time of peace has brought about conditions that have made war unnecessary. Without the demarcation of a line between peace and war, uncertainty as to the rights of the parties using force as well as of third parties prevails. Other conventions of the Hague Conference of 1907 rest upon the Convention Relating to the Opening of Hostilities. The discussions at the Hague in 1907 give ample evidence of the distinction between the idea of the resort to the use of force and the resort to war. The parties signing and ratifying the Hague Convention acted with clear understanding upon this matter and much of the recent confusion is due to writing and discussion that fails to make the legally established distinction which has prevailed since 1907. Some of these writers have based their conclusions upon eighteenth and nineteenth century practice and decisions from some of the unfortunate consequences of which the efforts of 1907 aimed to escape. Others have argued in a fashion implying that the Covenant of the League of Nations superseded all existing treaties and established a new vocabulary for international law and new principles for interpretation of treaties. Such methods discredit their conclusions and weaken confidence in the Covenant of the League. The Hague Convention of 1907, not drawn up at a time of exceptional international stress, aimed to take steps toward the maintenance of peace in the world on the basis

of respect for law, and no state or states were under compulsion to affix their signatures or to accept the conventions. The method of procedure in relation to the opening of hostilities may in brief summary show this.

Making Hague Convention III, 1907.—Before drawing up the Convention Relative to the Opening of Hostilities at The Hague, 1907, a questionnaire was prepared by the President of the subcommission to which the topic was committed for presentation. This questionnaire was as follows:

1. Is it desirable to establish an international understanding relative to the opening of hostilities?

(On the supposition of an affirmative response to this question:)

2. Is it best to require that the opening of hostilities be preceded by a declaration of war or an equivalent act?

3. Is it best to fix upon a time which must elapse between the notification of such an act and the opening of hostilities?

4. Should it be stipulated that the declaration of war or equivalent act to be notified to neutrals?

And by whom?

5. What should be the consequences of a failure to observe the preceding rules?

6. What is the diplomatic form in which it is best to set out the understanding? (III Proceedings of the Hague Peace Conference, Carnegie Endowment translation, p. 253.)

The first question was answered by a unanimous affirmative. There was, however, discussion as to whether there should be a requirement of a definite period between the declaration and the first act of hostilities. The Institute of International Law at its meeting in 1906 had been unable to agree that there should be a specified interval between the declaration and the act of hostilities. Since the state of war affects not merely the relations between the belligerents but also between belligerents and neutrals, it was pointed out in the discussions that this change should be made known to neutrals and in order that this might be done, the Convention provided in article 2 that:

The state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be given by telegraph. Neutral powers, nevertheless, can not plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.

Both in the preamble and in the articles of this Hague Convention III, the distinction between hostilities and a state of war is recognized. There might be a state of war without any hostilities or conflict of the armed public forces. The neutral rights and obligations arose from a known state of war regardless of whether any hostilities had or had not taken place.

Many of the other conventions drawn up at The Hague in 1907 presuppose the existence of a requirement making a declaration of war necessary, e.g., to determine days of grace, to determine right to convert merchant vessels into vessels of war, etc.

Radio in time of peace.—The use of radio in time of peace has been regulated by successive conferences during the twentieth century. Each conference has had new problems before it as the use and possibilities of use of radio have been extended. Several of the most recent conferences have been mainly concerned with details often of a highly technical character. Regulations for standardized wave lengths, etc., have been found essential for effectivity of radio communication. It has been clearly recognized that international cooperation is essential and at the same time the greatest possible national freedom is desirable. This is evident in the work of the conferences of Berlin (1906), and London (1912), Washington (1927), and Madrid (1932). In the time of peace the use of radio which is not in contravention to the agreements under the international conventions is wholly a matter of control of the authority within whose jurisdiction the station may be and under the convention states parties to the terms undertake to enforce provisions of the articles. No control of stations outside na-

tional jurisdiction is conferred though agreements are made as to their operation. A station upon a merchant vessel on the high sea in time of peace would, therefore, be under the jurisdiction of the flag which the vessel lawfully flies. When a vessel flying the flag of one state is within the territorial waters of another state, it is generally accepted that for acts which take effect outside the vessel the state within whose waters a vessel is may regulate the action of the vessel.

Radio in war.—The regulation of radio in time of war has received consideration at the Naval War College from time to time since 1907. (See General Index, 1901–30.) The conclusion from these discussions and from the practice in the World War may be summarized in article 2 of the Report of the Committee of Jurists:

> Belligerent and neutral Powers may regulate or prohibit the operation of radio stations within their jurisdiction. (1924 Naval War College, International Law Documents, p. 100.)

Mine laying.—The use of mines has long been a subject of differing opinion. Many regarded mines as embodying an unseen menace which should be prohibited, but as in the case of torpedoes and other modern means of warfare such objections have received relatively little attention other than to lead to the formulating of rules against mine laying involving unnecessary risk to noncombatants and neutrals. The use of mines during the Russo-Japanese war 1904–05 brought the matter to the attention of states just before the Hague Peace Conference of 1907, and that conference drafted a convention upon the subject of submarine mines. This convention provided:

> ARTICLE 1.
>
> It is forbidden:
>
> 1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after those who laid them cease to control them;
>
> 2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

ARTICLE 2.

It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

ARTICLE 3.

When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones soon as military exigencies permit, by a notice addressed to shipowners, which must also be communicated to the Governments through the diplomatic channel.

ARTICLE 4.

Neutral powers which lay automatic contact mines off its coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship-owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel. (36 U.S. Statutes, pp. 2332, 2343.)

A somewhat extended discussion of these and other articles of Hague Convention VIII relative to the laying of automatic contact submarine mines may be found in topic IV, pp. 100–138, of Naval War College, International Law Topics and Discussions, 1914.

Mines in World War.—Mines had been found useful in the Russo-Japanese and other wars and were used early in the World War. The American Ambassador at Berlin telegraphed to the Secretary of State on August 7, 1914:

The Foreign Office has the honor to inform the Embassy of the United States of America that during the state of war in which the German Empire now finds itself, the necessity will arise, according to prospects, of blockading with mines the points of departure for attacks on the part of hostile fleets against

Germany, and the ports of shipment, departing and arriving, of troop transport.

The Foreign Office begs the United States Embassy to bring this to the knowledge of its Government as soon as possible in order that shipping may be warned in due time against entering harbors and roadsteads which may serve as bases for the hostile forces. (1914 U.S. Foreign Relations, Supplement, p. 454, note 2.)

The Secretary of State on August 10 asked the American Ambassador in Great Britain if there was any foundation for the report that belligerents were scattering contact mines in the Channel. On the following day a reply was received,

The naval attaché is assured by Admiralty officials that Admiralty have not laid and will not lay mines in navigable waters except at entrance of ports they wish to defend. Sir Edward Grey tells me that Germany has been laying contact mines in the North Sea. The German mine-laying ship *Königen Luise*, recently destroyed by H.M.S. *Amphion*, was engaged in laying a line of contact mines to extend across the North Sea. (Ibid, p. 455.)

On the same day the British Chargé in Washington presented to the Secretary of State a copy of a telegram he had received the evening before from the Foreign Office, as follows:

The Germans are scattering contact mines indiscriminately about the North Sea in the open sea without regard to the consequences to merchantmen. Two days ago four large merchant ships were observed to pass within a mile of the mine field which sank H.M.S. *Amphion*. The waters of the North Sea must therefore be regarded as perilous in the last degree to merchant shipping of all nations. In view of the methods adopted by Germany the British Admiralty must hold themselves fully at liberty to adopt similar measures in self-defense which must inevitably increase the dangers to navigation in the North Sea. But, before doing so, they think it right to issue this warning in order that merchant ships under neutral flags trading with North Sea ports should be turned back before entering the area of such exceptional danger. (Ibid.)

While taking note of this communication and calling attention to the obligations under article 1 of VIII Hague Convention, 1907, the reply of August 13, said:

The Secretary of State is loath to believe that a signatory to that convention would wilfully disregard its treaty obligation, which was manifestly made in the interest of neutral shipping.

All restrictions upon the rights of neutrals upon the high seas, the common highway of nations, during the progress of a war, are permitted in the interests of the belligerents, who are bound in return to prevent their hostile operations from increasing the hazard of neutral ships in the open sea so far as the exigencies of the war permit.

If an enemy of His Majesty's Government has, as asserted, endangered neutral commerce by an act in violation of the Hague convention, which can not be justified on the ground of military necessity, the Secretary of State perceives no reason for His Majesty's Government adopting a similar course, which would add further dangers to the peaceful navigation of the high seas by vessels of neutral powers.

The Secretary of State, therefore, expresses the earnest and confident hope that His Majesty's Government may not feel compelled to resort, as a defensive measure, to a method of naval warfare, which would appear to be contrary to the terms of the Hague convention and impose upon the ships and lives of neutrals a needless menace when peaceably navigating the high seas. (Ibid, p. 456.)

On August 19 another communication from the British Chargé threw down the argument for neutral obligation which was later often brought forward by the belligerents,

His Majesty's Government share the reluctance of the Secretary of State to see the practice extended and the danger to neutral shipping increased. At the same time His Majesty's Chargé d'Affairs is instructed to point out that if Great Britain refrains from adopting the methods of Germany, the result is that Germany receives immunity unless the neutral powers can find some means of making Germany feel that she cannot continue to preserve all facilities for receiving trade and supplies through neutral shipping while impeding British commerce by means the use of which by Great Britain is deprecated by the United States Government. (Ibid, p. 458.)

On August 23 a communication further announced,

The Admiralty wish to draw attention to their previous warning to neutrals of the danger of traversing the North Sea. The Germans are continuing their practice of laying mines indis-

criminately upon the ordinary trade routes. These mines do not conform to the conditions of the Hague convention; they do not become harmless after a certain number of hours; they are not laid in connection with any definite military scheme such as the closing of a military port or as a distinct operation against a fighting fleet, but appear to be scattered on the chance of catching individual British war or merchant vessels. In consequence of this policy neutral ships, no matter what their destination, are exposed to the gravest dangers. Two Danish vessels, the S.S. *Maryland* and the S.S. *Broberg*, have within the last twenty-four hours been destroyed by these deadly engines in the North Sea while traveling on the ordinary trade routes at a considerable distance from the British coast. In addition to this, it is reported that two Dutch steamers clearing from Swedish ports were yesterday blown up by German mines in the Baltic. In these circumstances the Admiralty desire to impress not only on British but on neutral shipping the vital importance of touching at British ports before entering the North Sea, in order to ascertain according to the latest information the routes and channels which the Admiralty are keeping swept and along which these dangers to neutrals and merchantmen are reduced as far as possible. The Admiralty, while reserving to themselves the utmost liberty of retaliatory action against this new form of warfare, announce that they have not so far laid any mines during the present war and that they are endeavouring to keep the sea routes open for peaceful commerce. (Ibid, p. 458.)

The German Ambassador in a communication to the American Secretary of State dated September 10, 1914, said,

Mr. Secretary of State: By direction of my Government, I have the honor respectfully to bring the following to your excellency's knowledge:

No foundation for idea prevalent among neutrals abroad that sea trade with Germany is tied up by blockade of German ports. No port is blockaded and nothing stands in the way of neutral states' sea trade with Germany.

Assertions from England that North Sea is infested with German mines incorrect.

Neutral vessels bound for German North Sea ports should steer by day for a point 10 nautical miles northwest of Helgoland. There German pilots will be provided to bring ships into port.

Neutral vessels should steer direct for Baltic Sea ports, off every one of which there are pilots.

Prohibition of coal export not extended to bunker coal, and coaling assured. (Ibid, p. 460.)

On October 6 the French Government issued a notice asserting that Austria-Hungary was illegally laying mines in the Adriatic and that the French Navy would lay mines in conformity with stipulations of Convention VIII.

Soon protests, notes, counter notes, denials, etc., came from nearly all foreign offices and there followed what one reply characterized as a "volume of strong words and moral indignation." These communications came from both belligerents each affirming that its opponent was in the wrong, but generally admitting that the laying of mines for defense under the terms of Convention VIII was lawful.

Proposals of the United States, 1915.—The declaration by Germany of the war zone about Great Britain and the controversies over the use of mines led the United States on February 20, 1915, to propose to Germany and Great Britain the basis of an agreement.

Germany and Great Britain to agree:

(1) That neither will sow any floating mines, whether upon the high sea or in territorial waters; that neither will plant on the high seas anchored mines except within cannon range of harbors for defensive purposes only; and that all mines shall bear the stamp of the government planting them and be so constructed as to become harmless if separated from their moorings;

(2) That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search;

(3) That each will require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruse de guerre.* (1915 U.S. Foreign Relations, Supplement, p. 119.)

To this proposition the German Government replied, February 28:

With regard to the various points of the American note they beg to make the following remarks:

1. With regard to the sowing of mines, the German Government would be willing to agree as suggested not to use floating mines

and to have anchored mines constructed as indicated. Moreover, they agree to put the stamp of the Government on all mines to be planted. On the other hand, it does not appear to them to be feasible for the belligerents wholly to forego the use of anchored mines for offensive purposes.

2. The German Government would undertake not to use their submarines to attack mercantile of any flag except when necessary to enforce the right of visit and search. Should the enemy nationality of the vessel or the presence of contraband be ascertained submarine would proceed in accordance with the general rules of international law. (Ibid. p. 130.)

Great Britain did not reply till March 15 and then said:

On the 22d of February last I received a communication from your excellency of the identic note addressed to His Majesty's Government and to Germany respecting an agreement on certain points as to the conduct of the war at sea. The reply of the German Government to his note has been published and it is not understood from the reply that the German Government are prepared to abandon the practice of sinking British merchant vessels by submarines, and it is evident from their reply that they will not abandon the use of mines for offensive purposes on the high seas as contrasted with the use of mines for defensive purposes only within cannon range of their own harbours as suggested by the Government of the United States. This being so, it might appear unnecessary for the British Government to make any further reply than to take note of the German answer. We desire, however, to take the opportunity of making a fuller statement of the whole position and of our feeling with regard to it. (Ibid, p. 140.)

There followed in the somewhat long note a statement in regard to the German conduct of the war and of the grounds which Great Britain considered as justifying its action on various matters.

Summary of the attitude of the United States.—The Counselor for the Department of State, Frank L. Polk, sent to Representative John J. Fitzgerald, a memorandum upon the attitude taken by the Department of State in way of protest against action of belligerents considered in violation of the principles of international law.

The summary of the attitude toward the use of mines up to August 18, 1916, was stated as follows:

The illegal use of mines in the present war has not been confined to any one belligerent. Both sides have violated the rights of neutrals and have sown large areas of the high seas with mines, the result of which has been the destruction of a number of neutral vessels.

On August 7, 1914, the German Government notified all neutral countries that the trade routes to English ports would be closed by mines.

In a note dated August 11, 1914, the British Ambassador alleged that Germany had scattered contact mines indiscriminately about the North Sea, and informed this Government that in view of this fact the British Admiralty would adopt similar methods in self-defense.

On August 13 the Secretary of State protested against such action on the part of Great Britain, stating that even "if an enemy of His Majesty's Government has, as asserted, endangered neutral commerce by an act in violation of the Hague convention, which cannot be justified on the ground of military necessity," this country saw no reason for Great Britain adopting a similar course which would add further to the dangers to peaceful navigation of the high seas by vessels of neutral powers.

On November 3, 1914, Great Britain, alleging that during the past week the German Government had scattered mines indiscriminately in the open seas and on main trade routes from America to Liverpool via the north of Ireland, that peaceful merchant ships have already been blown up, and that the mines were laid by some merchant vessels flying neutral flags, declared the North Sea a military area, and that all ships that did not follow an indicated course would be in grave danger from the mines it had been necessary to lay.

On February 4, 1915, Germany in retaliation for various alleged illegal acts on the part of Great Britain, notified neutral nations that "the waters surrounding Great Britain and Ireland, including the whole English Channel, are hereby declared a war zone." It was indicated at the same time that they would ignore the rule of international law requiring visit and search and would sink merchantmen without first ascertaining whether they were neutral or enemy ships and without making provisions for the safety of passengers and crew.

To this proclamation the United States on February 10, 1915, protested, and pointed out that such action on the part of Germany would endanger the lives and property of citizens of neu-

tral and friendly nations, and would violate the principles of international law. In its note the United States stated that:

"The Government of the United States has not consented to or acquiesced in any measures which may have been taken by the other belligerent nations in the present war which operate to restrain neutral trade, but has, on the contrary, taken in all such matters a position which warrants it in holding those governments responsible in the proper way for any unlawful effects upon American shipping which the accepted principles of international law do not justify, and that it therefore regards itself as free in the present instance to take, with a clear conscience and upon accepted principles, the position indicated in this note."

On February 20, 1915, the United States in the interest of neutral commerce sent identic notes to Germany and Great Britain in which the hope was expressed that these two belligerents "may through reciprocal concessions, find a basis for agreement which will relieve neutral ships engaged in peaceful commerce from the great dangers which they will incur on the high seas adjacent to the coasts of the belligerents," and outlined a course of action with regard to the sowing of mines and the importation of foodstuffs into Germany, to which it was hoped they would agree. Unfortunately it was not possible to secure the consent of the two Governments to the proposal. (1916 U.S. Foreign Relations, Supplement, p. 5.)

Résumé.—While strained relations may cause a state to exercise such measures as it may deem expedient within the laws of peace, such relations do not permit the exercise of the rights of war toward third states. The Pact of Paris of August 27, 1928, declares against war, but not against resort to peaceful measures for settling differences between states. A strait which is the sole highway communication between two open seas, as the Strait of Gibraltar, may not be closed in peace or war, while a strait which forms a more convenient or more commonly used highway to which there is a reasonable alternative way may be subject to such restrictive measures upon its use as the adjacent states may deem essential for self-defense. The use of radio is generally prescribed by international conventions to which the leading states of the world are parties. The conventions do not give to a state jurisdiction outside territorial limits over vessels not flying its flag though in time of war

rules may be more extended and action necessary for self-defense may be taken in the immediate area of belligerent operations. In recent years, since 1907, most states have by convention or in practice not resorted to war without previous declaration many of which in the World War contained detailed reasons and specific indication of the time when the status of war would exist. After such declaration the use of submarine mines under enumerated restrictions is permitted by the Convention of 1907.

SOLUTION

1. *In time of peace.*—(*a*) States C and D have no exceptional rights of jurisdiction over a strait along their coasts connecting generally used water areas, though states C and D may take action necessary for self-defense.

(*b*) Vessels of other states have the right of innocent passage through the strait but they are subject to reasonable regulations while within the territorial waters of C or D.

(*c*) The *Bara* as a merchant vessel of state B is entirely exempt from the jurisdiction of state C while on the high sea, but must conform to the regulations of state C and D when within the jurisdiction of those states.

2. *In time of war.*—(*a*) States C and D have a right to regulate the use of their territorial waters and the waters within the immediate area of their operations.

(*b*) Vessels of neutral states have the right of innocent passage through the strait though they are subject to reasonable regulations while within the territorial waters of C or D. In view of the fact that the strait is not the sole but the more convenient and commonly used waterway, the rights of C or D may, as an extreme measure, extend to closing of the strait.

(*c*) After the declaration of war, the *Bara*, as a merchant vessel of state B, is under obligation to observe the regulations of state C or D when within the territorial jurisdiction or the immediate area of the operation of their forces.